FOURTH HIGH LEVEL MEETING ON
THE ROLE OF THE JUDICIARY IN
INTERNATIONAL COMMERCIAL ARBITRATION

23rd-24th October 2014, St Lucia

Dialogue on International Arbitration in the Caribbean

Judicial Constraints/Policies and International Dimensions to Arbitration

A PAPER BY

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Introduction

The author is a practising Arbitrator in London and in St Vincent and the Grenadines, specialising in commercial disputes with particular emphasis on construction, engineering and energy disputes. Also a Deputy District Judge[1], practising Barrister and Mediator, the author has a wide experience of various forms of arbitration in the Caribbean, the UK and internationally.

Judicial Constraints and Policies

A Court should be slow to intervene in arbitration and should only intervene if and to the extent permitted by the relevant Laws. The Court must consider which laws apply to the matter before them as there may be different laws which apply to the substantive contract, the arbitration agreement, the seat of arbitration and the procedure of the arbitration. Currently, many local laws in the Caribbean permit far greater scope for interference than would usually be expected in international commercial arbitration.

Wherever reasonably possible, a Court should seek to uphold and support arbitration by assisting arbitrators and enforcing their Awards. It should only be in an exceptional case

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(and such cases will exist) that the Court should intervene to correct errors by an arbitrator or to set aside an Award. Wherever possible the Court should endeavour to keep an arbitration on track, move the arbitration forward without delay and to uphold and enforce Awards.

Court powers in support of arbitration

The UK is recognised as a centre for international arbitration. To give some understanding of what is commonly expected in international arbitration, the following is a summary of the Courts powers under the Arbitration Act 1996 in England and Wales.

The court has a number of powers it can exercise, although the general principle is minimal court intervention in an arbitration. This is an important principle which the Courts will follow in the exercise of any powers granted under the Act.

The Courts powers are set out in the relevant Act in the jurisdiction in which the application is made. Examples of such powers are:

- appointment of an arbitrator
- securing the attendance of witnesses
- determination of a preliminary point of law

Application to court in support of an arbitration

There are a number of different types of applications which can be made to the court in support of an arbitration. When considering making such an application it is important to be aware that permission of the tribunal or agreement of the other parties to the arbitration may be required. The procedure for such applications is set out in Court Rules (such as CPR 62 in England) and there are also specific requirements as to where such an application can be issued.

Stay of court proceedings - to enable arbitration

A party can apply to the court to stay court proceedings which were started despite a valid arbitration agreement. In England under the Arbitration Act 1996 (which I shall

refer to as “the 1996 Act”), a court must grant a stay unless it finds that the arbitration agreement is 'null and void', inoperative or incapable of being performed. However, in some Caribbean jurisdictions operating under earlier Laws the Court still has discretion whether or not to grant a stay. This creates an uncertainty which is not welcome in international arbitration. The right to apply for a stay maybe lost if the challenging party takes 'any steps' in the proceedings. Proceedings brought in breach of an arbitration agreement may entitle the defendant to indemnity costs.

Stay of arbitration - following a settlement agreement

Where parties have agreed a settlement then if it does not cover all of the issues in dispute between the parties, the tribunal will still have jurisdiction to deal with those issues a court must, under the 1996 Act in England, refer such disputes to the arbitral tribunal. If there is a dispute as to whether a settlement agreement was reached or its terms then again the dispute must be decided by the arbitral tribunal, the court does not have the power to grant an injunction to prevent a party pursuing the dispute by arbitration. However, under older Laws the Court may have a discretion whether or not to allow the remaining issues to be dealt with by the Court.

Emergency relief -- tribunal and court powers

Emergency relief can be provided under powers exercised by the tribunal or by the court as provided for by the 1996 Act. In many instances, the tribunal's powers are agreed by the parties. However, where they are not, the Act's provisions will apply.

The court's powers, as set out in the Act, are the same as those the court would have in legal proceedings. However, the court can only exercise such powers in certain circumstances. The court can grant emergency relief outside England and Wales. The court has a discretionary power in this case and may decide it would be inappropriate for it to grant such relief.

Emergency relief -- applications and appeals

The procedure to be used in applying for emergency relief will depend on whether it is an urgent or non-urgent application. If an application is urgent then it can be made prior

to the issue of a claim form. If the relief is granted then a claim form must be issued promptly so that the court has jurisdiction to sustain the injunction granted. Urgency is not defined in the Act but has been considered in case law.

Non-urgent application must be brought in accordance with CPR 8. In international arbitrations specific consideration should be given to ensuring that permission to serve out of the jurisdiction can be obtained.

Leave of the court is required to appeal any court decision in relation to emergency relief.

Challenging the validity of an arbitration agreement

Arbitration agreements are distinct and separate agreements to the main agreement between the parties - the 'doctrine of separability'. An arbitration agreement may therefore still be valid even when the main agreement is not.

Claims as to the validity of the arbitration agreement may be dealt with by the courts (as provided for in the Arbitration Act 1996 and the CPR) or by the tribunal. A challenge should be made as soon as possible; a party may lose the right to challenge if it delays doing so.

The ICC rules have specific provisions enabling the ICC Court to decide whether arbitration proceedings should continue when there is an issue as to the validity of the arbitration agreement.

Determining a preliminary point of law

The court can determine any question of law arising in the course of the proceedings, unless otherwise agreed by the parties. Certain criteria under the Arbitration Act 1996 must be adhered to.

The CPR sets out the documents required to make such an application to the court and the procedural requirements; which vary depending on the court in which the application is made.

Determining a preliminary point of substantive jurisdiction

A court has the power to determine any question as to the substantive jurisdiction of the tribunal; certain criteria under the Arbitration Act 1996 must be adhered to.

The CPR sets out the documents required to make such an application to the court and the procedural requirements, which vary depending on the court in which the application is made. There are strict time limits in place for such applications, in particular for evidence in response and in reply. Determination is generally made on the documents without a hearing.

Challenging the award -- general

This may take place in the national court, where the award was made, or at the enforcement stage.

Under the 1996 Act, an award can only be challenged on limited grounds. These are:

- lack of substantive jurisdiction of the tribunal (mandatory): Section 67
- a serious irregularity which has or will cause a substantial injustice to the applicant (mandatory): Section 68
- an appeal on a point of law (not mandatory): Section 69

Challenges may be heard in private to retain the confidential nature of arbitration. The court has a number of options available to it following its hearing of the challenge, for example, it may confirm the award, set it aside, or remit it back to the tribunal.

Courts have the power to grant security for costs on appeal.

Challenging the award -- no substantive jurisdiction (Section 67 of the 1996 Act)

The court's power to hear such an appeal is mandatory. A party may challenge an award on the grounds that the tribunal lacked substantive jurisdiction. This power is exercised sparingly and applications are generally unsuccessful. Applications may be brought where the tribunal has declined jurisdiction.

The appeal is a full rehearing. The procedure for the application to appeal is set out in the CPR.

Challenging the award -- serious irregularity (section 68 of the 1996 Act)

The court's power to hear such an appeal is mandatory. To make such a challenge, an applicant must show (with supporting evidence) that:

- a serious irregularity affected the tribunal, proceedings or award; and
- the serious irregularity has or will cause a substantial injustice to the applicant

There are various categories of serious irregularity, for example:

- the tribunal exceeds its power
- failure by the tribunal to deal with all the issues
- uncertainty or ambiguity

Such challenges are only for use in exceptional cases and there is a high burden of proof for these appeals. An appeal of this nature must be brought within 28 days of the award. The procedure for the appeal is set out in the CPR.

Challenging the award -- categories of serious irregularity (section 68)

There are nine categories of serious irregularity under which a party may seek to challenge an arbitration award. These are listed in section 68(2) of the Arbitration Act 1996 and include:

- the tribunal exceeding its power
- the tribunal failing to deal with all the issues

Challenging the award -- serious irregularity by fraud and public policy (Section 68)

One of the nine categories of serious irregularity under which a party may seek to challenge an arbitration award under section 68(2) of the Arbitration Act 1996 is that of fraud and public policy. There are different basis on which such a challenge may be brought for example:

- the deliberate withholding of documents
- unconscionable conduct

It is important to understand that a substantial injustice caused by the fraud or breach of public policy will also need to be established.

Challenging the award -- appeal on a point of law (section 69)

The court's power to hear such an appeal is not mandatory under the Arbitration Act 1996 (the Act); parties may contract out of this right. Leave to appeal is required and the procedure to obtain this is set out in the CPR. If permission is granted then an appeal will need to be made.

Appeals are only permitted in relation to a question of English law. A court will consider the definition of a permissible point of law and what documents can be referred to in such an appeal.

Challenging the award -- leave to appeal (section 69)

The procedure for the application to appeal is set out in the CPR. The guidance set out in the practice direction was updated on 1 October 2010 so as to limit the extent of the documentation which could be put before the court during such an appeal. it is important to be aware of the new provisions.

Court discretion to extend the 28 day time limit for challenges and appeals

There is a 28 day time limit in which a party is able to bring a challenge or an appeal under sections 67, 68 and 69 of the Act. The court has discretion to extend the time for making such an application but it will not be made lightly. Whilst each case will be considered on its facts the court will also consider specific factors which were set out in *Kalmneft JSC v Glencore International AG and another* [2001] EWHC QB 461. However, in international arbitrations, it should be noted that the considerations will also be balanced against the general considerations which apply to international arbitrations.

Form and nature of awards

A tribunal may deliver awards during and at the end of the arbitral process. Unless parties agree otherwise, the award must be a certain form, as set out in the Arbitration Act 1996, institutional rules or UNCITRAL. The award must record the tribunal's findings, but it also provides other information such as the factual background to the case and the issues in dispute.

There are different types of award depending on the issues being dealt with and when the award is made, for example, a partial award and a final award.

Other issues to consider are:

- the wide range of remedies that can be set out in an award
- the time limits for making an award
- an award maybe withheld by a tribunal when exercising a lien
- how the date of the award is determined

Correction of an arbitral award

Any correction of an arbitral award will form part of that award. The powers of a tribunal to correct an award can be agreed by the parties. In the absence of any such agreement, the Arbitration Act 1996 provides that an award maybe corrected either by the tribunal on its own initiative or on an application by a party. it is important to be aware of the procedure to make an application for correction and in particular the time limits which apply.

Enforcing awards -- non-New York Convention

Where the court gives permission, an award may be enforced by way of a judgment being entered on the same terms as the award. The court will not give permission in certain circumstances, for example, where it is shown that the tribunal lacked jurisdiction to make the award.

The procedure to enforce such an award is set out in the Civil Procedure Rules.

Enforcing awards -- New York Convention

The New York Convention (the NYC) assists parties in enforcing awards in any of the signatory states to the convention. The convention requires any award to be in a particular form. NYC awards are recognised as binding on the parties to the arbitration agreement. To enforce the award a party has to apply to have the award recognised and for permission to enforce. When obtained, an award may be enforced by entering judgment in the terms of the award.

In England and Wales the procedure for recognition and permission to enforce is set out in the Civil Procedure Rules. Recognition and enforcement may be refused but only in specific circumstances as set out in the NYC and the Arbitration Act 1996.

Some Examples from the Courts

The above sets out the theory but what happens in practice. I will illustrate this by three examples as follows.

Sinclair v Woods of Winchester No. 2 [2006] EWHC 3003 (TCC)

This case concerned an application under S.69 of the Arbitration Act 1996 for leave to appeal against an arbitrators Award. The Court referred to earlier cases which set out the general approach to applications to remit or set aside an Award, including *Lesotho Highlands Development Authority v. Impregilo SpA & Ors* [2005] UKHL 43, 101 Con LR 1. HHJ Coulson QC (as he was then) said:-

> "7. *Although I deal with each of those ingredients briefly the first point to make is that the Court has limited power to intervene in an arbitration. That is one of the principal purposes of the Arbitration Act 1996: see Lesotho Highlands Development Authority v. Impregilo SpA & Ors [2005] UKHL 43, 101 Con LR 1.) However, that does not mean that the Court will routinely reject any attempts to appeal questions of law in arbitral awards. In my judgment, the proper approach to the Court's power to intervene is that set out in paragraphs 50 and 57 of the judgment of Jackson J., in Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727 (TCC) as follows:*
> *"50...The court must decide any questions of law raised by the appeal, however difficult or finely balanced they may be. There is no philosophy or ethos of the 1996 Act which should deter the court from answering those questions correctly, in the event that the arbitrator has erred. I reach this conclusion for five reasons:*
> *1.Party autonomy is one of the three general principles upon which Part 1 of the 1996 Act is founded (see section 1(b) of the 1996 Act).*
> *2.The parties in the present case, in the exercise of their autonomy, have agreed that an appeal shall lie to the courts on any questions of law.*
> *3.The principle of non-intervention stated in section 1(c) of the 1996 Act is qualified by the important words, "except as provided by this Part". Section 69(2)(a) of the 1996 Act is a provision falling within that exception. It expressly permits an appeal on questions of law to be brought by agreement between the parties.*
> *4.Lesotho Highlands should be distinguished because it concerned proceedings under section 68 of the 1996 Act. In Lesotho Highlands the general principles set out in section 1(b) and section 1(c) of the 1996 Act pointed strongly in favour of non-intervention. The consequence in Lesotho Highlands was that the House of*

Lords refused to set aside or remit an arbitral decision, which was wrong in law. The present case, which is brought under section 69(2)(a), is at the other end of the spectrum.
5.The above conclusions are consistent with the observations of Judge Humphrey Lloyd Q.C. in Vascroft (Contractors) Ltd v Seeboard plc [1996] 78 BLR 132 at 163 - 164.

57...i. The court should read an arbitral award as a whole in a fair and reasonable way. The court should not engage in minute textual analysis.
ii. Where the arbitrator's experience assists him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court will accord some deference to the arbitrator's decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer."

As to a question of law, HHJ Coulson said:-

"*(a) Question of Law*

1. *It is not always easy for the applicant to identify a pure point of law. Many issues which come before the Court pursuant to applications under s.69 of the 1996 Act are in reality questions of mixed law and fact. In those circumstances, provided that the decision reached by the Arbitrator was within the permissible range of solutions open to him no error of law arise: see The Matthew [1992] Lloyd's Rep 323 and Benaim (UK) Ltd. v Davies Middleton & Davies Ltd [2005] EWHC 1370 (TCC).*

2. *For the avoidance of doubt it is simply not possible for a party to seek permission to appeal on Arbitrator's findings of fact no matter how wrong they might seem to be: see The Baleares [1993] 1 Lloyd's Report 215 and Demco Investments & Commercial SA & Ors v SE Banken Forsakring Holding Aktiebolag [2005] EWHC 1398 (Comm).*"

E. Pihl & Sons A/S (Denmark) v. Brøndum A/S (Denmark) Barbados Civil Appeal No. 24 of 2012 [Unreported].

This case is an example of where the Courts have not given the necessary support to an international arbitration. I would state here that I make no criticism of the Court or the Judges in this case but merely use it as an example of what parties to an international arbitration would not want to happen.

In this case the Barbados Court of Appeal had to decide whether an arbitration agreement meant that there should be one arbitrator or three. On 19th January 2010, Brondum (the Claimant in the Arbitration and the Respondent to the Appeal) made an application to the Court for the appointment of a single arbitrator. Two names were put forward, of which I was one. The application was heard on 22nd October 2010 by Worrell J who delivered his judgment on 30th March 2012 (two years after the application had been filed and 17 months after the hearing). The Appeal was heard on 28th February 2013 and judgment handed down on 23rd October 2013. Overall it took the Court, three years and 9 months to decide whether there should be a tribunal of one arbitrator or three – by which time the Appellant, Pihl, had gone into liquidation. This was a relatively simple matter which needed a decision from the Court to allow the arbitration to proceed. The delay effectively prevented the arbitration from ever getting off the ground.

ICS (Grenada) Limited v NH International (Caribbean) Limited Trinidad and Tobago
Case HCA No. Cv 1541 of 2002

This case helpfully sets out the Trinidad Courts approach to challenges to an arbitrator's Award, which generally follows that adopted in England. It includes some interesting historical references, for example to the English Arbitration Act of 1889. The Court had to consider allegations of 'misconduct' by the arbitrator (a term which as now been abandoned in more recent Acts). In answer to one of the many grounds of appeal, the Courts stated

> "*Ground (i)*
> *This ground alleges misconduct. It invites this Court to review the evidence and conclude that the arbitrator was wrong. However, 'it is not misconduct to make an erroneous finding of law or fact' – Halsbury's supra and see also,* ***Moran v Lloyds****, supra, at page 475. Furthermore, Courts are predisposed to adopt 'a benevolent attitude to the interpretation of arbitral awards and particularly to those made by commercial men' – Mustill, supra, at page 570. Thus, 'in case of uncertainty (a court) will so far as possible construe the award in such a way as to make it valid rather than invalid. And, 'in case of uncertainty (a court) will assume any justifying facts which could exist did exist, even though the arbitrator has not found them.' [Mustill, supra].*
>
> *In any event, an error of fact can only arise when it appears on the face of the award –* ***Moran v Lloyds*** *supra – and this has not been demonstrated or alleged here.*"

This case was cited and relied upon in a more recent case in Trinidad where the losing party sought to challenge one of my Awards. The submissions made by Senior Counsel in opposition to the application included the following:

"*The benevolent approach of the Court*

24. The Courts generally take a benevolent approach to the interpretation of awards. In cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid (per Mustill (supra.) at pages 511 to 512 under the rubric "The Benevolent Interpretation of Awards"; ICS (Grenada Limited) (supra.) at page 23). The Courts therefore strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. Arbitration awards should be read in a reasonable commercial way expecting that there will not be a substantial fault that can be found with it (per Bingham J in Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14 275 EG 1134, quoted by Rahim J at paragraph 9 of Civil and General Contractors Limited v First Citizens Bank Limited CV 2012-01882). The approach of the Courts has generally been to support the validity of an award made by an arbitrator and to make every reasonable intendment and presumption in its favour: see Meyer v Leanse [1958] 2 QB 371 per Parker LJ, the rationale being that:

> *"The parties having agreed to arbitration and the arbitrator's decision being final they cannot ordinarily complain if the award is made in consequence of an error of fact or an error of law or both. But in the course of its supervisory jurisdiction the Courts have developed limited powers of interference now partly enshrined in ss 22 and 23 of the Arbitration Act, 1950, enabling them to set aside an award or remit it for reconsideration." per Judge Fay QC in Stockport MBC v O'Reilly [1978]1 Lloyd's Rep. 595 at page 597.* (Per Rahim J. in Civil and General Contractors Limited v First Citizens Bank Limited, *ibid.*, at paragraph 8)"

25. Further, as Russell (supra.) (at pages 352-353) and Mustill (supra.) (at page 499) note, the Court retains a discretion to refuse to interfere with an award even where there exists one of the grounds on which it may be set aside. If the defect is trivial the Court is entitled to disregard it altogether. The examples given by Russell are where the principle de minimis curat lex applies or where the applicant could have stated a case to the Court on a point of law (under the equivalent of section 32 of the Trinidad and Tobago Act) during the arbitration but did not do so."

The judgment has not been reported but Counsel's note of the judgment records that Mr Justice Boodoosingh said:-

> "*The Arbitrator's award and reasons are dated 25-03-2013. The decision would stand unless on the face of it, it was clearly erroneous. It is not misconduct if there is an error of fact or law, nor to misconstrue the position of the parties. Any error*

of law must appear on the face of the award. See the case of HCA No. 1541 of 2002 ICS (Grenada Limited) –v- NH International (Caribbean) Limited or based on an unsound legal principle.
In the case of CV 2012-01882 Civil and General Contractors Limited –v- FCB. J. Rahim set out various particulars of misconduct.
In analyzing the award we see that the Arbitrator's decision was based on whether the termination was valid. The matter raised certain land acquisition issues and he found the actual termination was not valid as the notice by letter of 16th October 2009 was not a valid notice of termination. The arbitrator found that WASA was in repudiatory breach of the contracts resulting in damages being recoverable, in the form of loss of profit.
No erroneous point of law has been identified, what the Claimant does is invites a different interpretation which is not considered misconduct. I have considered the particulars of misconduct (a)-(j) as set out in the Statement of Case but find that they do not amount to misconduct (Court reads particulars a-j of the Statement of Case).
The Arbitrator found that the procedure for termination was not properly followed and noted that times and procedures in building contracts must be meticulously carried out. Based on the FCB case I cannot find there was any error of law.
The Arbitrator based the award on the value of the contracts and looked at the profit element, and I can find no fault, and again no error of law on the face of the award. In the circumstances the action to set aside the award is dismissed."

The term 'misconduct' is no longer used and in the more recent Acts, such as the English Arbitration Act 1996, use the term 'serious irregularity'. This is another example of why local laws need to be brought up to date to bring them into line with the reasonable expectations of parties to international arbitrations.

CONCLUSION

The Caribbean region is continuing to develop its international trade and more foreign companies will be exploring the options and benefits of working in the Caribbean. One aspect of a business decision to work in the region will be to consider what happens if things go wrong. How will we get paid? How will we resolve any disputes? Foreign companies will not wish to get entangled in litigation which will be very costly and may take years to resolve with an uncertain outcome. Such risks act as a deterrent to international trade. Foreign companies will seek a degree to certainty and will want to know 'the rules of the game' before they commit to an investment.

International commercial arbitration can provide a relatively efficient way of resolving disputes where the parties know and understand the procedure, they can select their arbitrator, they can maintain confidentiality and are reasonably confident that they will get a decision within a reasonable period. The role of the Courts is to provide a supervisory and regulatory role whereby the parties' decision to resolve their dispute by arbitration is respected and the Court only intervenes if and when it is necessary to maintain the rules of natural justice, apply public policy within the justifiable restrictions placed on their powers.

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